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IN THE

Supreme Court of the United States

1971 TERM

NO. .....

DOYAL SMITH, WARDEN,
PUTNAM COUNTY PRISON,

Petitioner,

v.

WILLIAM PAUL HIATT,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, Doyal Smith, Warden, Putnam County Prison, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on February 1, 1972.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears together with the judgment in the appendices hereto as Appendix "A". The opinion of the District

Court, also unreported, appears in the appendices hereto as Appendix "B".

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 1, 1972. Stays of mandate have been granted. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the traditional, longstanding Georgia jury instructions regarding alibi, considered in the context of the instructions in their entirety, have the effect of shifting to the defendant the burden of persuasion on an essential element of the crime charged, thereby relieving the prosecution from proving every element of the offense beyond a reasonable doubt and impairing the presumption of innocence with resulting deprivation of due process of law.

2. Whether the initial decision on the constitutionality of the traditional, longstanding Georgia alibi charge should be applied retroactively to a convicted State prisoner who challenges such jury instructions for the first time in a federal collateral attack on the conviction.

3. Whether the decision of the Court of Appeals for the Fifth Circuit in *Jack H. Smith v. S. Lamont Smith,* 5 Cir. 1971, 454 F.2d 572 (5th Cir. December 14, 1971), now pending in this Court on petition for certiorari, No. 71-1148, 1971 Term, should apply to the instant case if the circuit court decision in *Smith* is upheld or if certiorari to review *Smith* is denied.

STATUTORY PROVISIONS INVOLVED

Ga. Code § 38-122 (1933):

> 38-122 (1018 P.C.) Alibi as a defense.—Alibi, as a defense, involves the impossibility of the accused's presence at the scene of the offense at the time of its commission; and the range of the evidence, in respect to time and place, must be such as reasonably to exclude the possibility of presence. (59 Ga. 142; 65 Ga. 756; 64 Ga. 344.)

STATEMENT OF THE CASE

On February 22, 1969, the Grand Jury of Cobb County, Georgia, indicted William Paul Hiatt for robbery. A sentence of four years' imprisonment was imposed by the Superior Court of Cobb County on August 20, 1969, following conviction and fixing of sentence by a jury. Without complaining to the trial court of the charge given to the jury, and without appealing his State criminal conviction to the Supreme Court of Georgia or seeking any State post-conviction relief,[1] Hiatt, by counsel, filed a federal petition for writ of habeas corpus in June, 1971, claiming relief on the grounds which are now at issue before this Court. The United States District Court for the Middle District of Georgia, Macon Division, relieved Hiatt from exhausting his state remedies and considered the petition on its merits, denying relief by order of July 9, 1971. See Appendix B. No hearing was held, but the court had before it the indictment, sentence, and entire charge of the criminal trial court.

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[1]The Georgia Habeas Corpus Act of 1967 (Ga. Laws 1967, pp. 835, 836; Ga. Code Ann. § 50-127) provides the procedure for suing out a writ of habeas corpus for persons whose liberty is being restrained by virtue of a superior court sentence.

An appeal was pursued by counsel for Hiatt to the United States Court of Appeals for the Fifth Circuit, following issuance of a certificate of probable cause on August 5, 1971. That Court reversed summarily on February 1, 1972, without hearing oral argument, and required that Hiatt be retried by the State court. See Appendix A. This petition, by the warden whose custody of Hiatt is authorized by the challenged sentence, follows.

Hiatt's sole complaint concerned a portion of the charge given to the jury by the trial court at his state court criminal trial. The instruction he complained of dealt specifically with the defense of alibi and constituted the following:

> "Alibi as a defense, involves the impossibility of the defendant's presence at the scene of the offense at the time of its alleged commission, and the range of evidence, facts and circumstances submitted to you in respect to time and place must be such as to reasonably exclude the possibility of the defendant's presence at the scene of the alleged crime at the time of the alleged occurrence. Alibi as a defense must be established to the reasonable satisfaction of the Jury.
>
> The Court charges you that when the defendant sets up, as a defense, alibi, the burden is upon him to establish his defense of alibi to your reasonable satisfaction. It must be such as to reasonably exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission, and when so established to the reasonable satisfaction of the Jury, it is the duty of the Jury to acquit. Evidence as to alibi should be considered by the Jury in connection with all of the other evidence in the case, giving it such weight and credit

> as you think it is entitled to receive, and if, on considering the evidence as a whole, the Jury should entertain a reasonable doubt as to the guilt of the accused, it should be their duty to acquit."

The assertion was that this portion of the charge deprived Hiatt of Fourteenth Amendment due process of law because it placed the burden of proving his defense on defendant and thereby shifted the burden of proof to him and deprived him of the presumption of innocence. It was further asserted that the instruction relieved the State of the burden of establishing that he was present at the scene of the crime beyond a reasonable doubt, and that he was deprived of due process because the instruction was confusing and inconsistent.

The warden argued in the court below that the instruction complained of did *not* require the defendant to disprove an essential element of the prosecution's case nor conversely relieve the State from the burden of proving beyond a reasonable doubt each and every element of the offense charged. It was shown that the cases upon which the prisoner relied were inapposite both factually and as a matter of logic; that the instruction, upon examination, merely treated the possibilities that are presented when alibi evidence is introduced in a criminal trial; and that, furthermore, the instruction must be considered in the context of the entire charge to the jury.[2] It was additionally argued that, should the appellate court strike down the instruction, the decision to do so should have prospective application only.

Following reversal of the district court, and on several motions filed by the warden, stay of the issuance of the

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[2]The entire charge of the state criminal trial court is appended hereto as Appendix C.

mandate was granted until final disposition in the United States Supreme Court of the case of *S. Lamont Smith v. Jack H. Smith*, 1971 Term, No. 71-1148, petition for writ of certiorari pending.

REASONS FOR GRANTING THE WRIT

The decision of the court below turned upon its decision in the case of *Smith v. Smith*, 5th Cir. No. 71-1311, rehearing denied February 1, 1972, certiorari applied for, U.S. Supreme Court No. 71-1148, docketed March 8. Reasons enumerated for granting the writ in the instant case are the same as those contained in the application filed with this Court in No. 71-1148. In the interests of economy and the obvious desirability of consolidating the numerous cases turning upon the same questions of law, the argument in support of the reasons for granting the writ in the previously docketed application for a writ of certiorari is hereby incorporated by reference. Copies of the application for certiorari in *Smith v. Smith* are attached to and accompany the service copies of this application.

I.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH A DECISION FROM THE COURT OF APPEALS FOR THE FIRST CIRCUIT ON THE SAME CONTROLLING PRINCIPLE OF FEDERAL CONSTITUTIONAL LAW.

II.

THE DECISION OF THE COURT BELOW IS IN DIRECT AND IRRECONCILABLE CONFLICT WITH A SERIES OF CONTEMPORARY DE-

CISIONS OF THE SUPREME COURT OF GEORGIA ON THE SAME PRINCIPLE OF FEDERAL CONSTITUTIONAL LAW.

III.

THE DECISION MISCONCEIVES, MISCONSTRUES AND MISAPPLIES A DECISION OF THIS COURT ON A VITALLY IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW.

IV.

IN THE EVENT THE *SMITH* RULING IS UPHELD, IT SHOULD HAVE PROSPECTIVE EFFECT ONLY.

There is yet a fourth reason for granting the writ in this case. It arises from the summary application of the decision in *Smith* to the case at hand, without limiting the holding in Smith to prospective use.

Hiatt was convicted on August 20, 1969. It was at that time that the charge here involved was given. The Fifth Circuit decision in *Smith, supra,* which was the basis for the reversal of the denial of habeas corpus in the instant case, was announced on December 14, 1971. The underlying case, then, was decided several years after Hiatt's trial and the giving of the charge complained of.

Even if the charge fails now to meet constitutional muster, and it has been demonstrated and is urged that it does not so fail, the decision in *Smith, supra,* should not be applied retrospectively in this case.

Petitioner's position in this regard was stated in the Briefs for the Appellant filed in the Fifth Circuit in the

Smith case and in the related case of *Thornton v. Caldwell*, 5 Cir. 1971, ... F.2d ..... [January 4, 1972, No. 71-1603], petition for writ of certiorari filed in this Court on or about the same day as the instant petition. That position, advanced earlier by Petitioner, is firmly restated here:

> While it is presently impossible to state with accuracy the number of Georgia convictions which would stand to be affected and relitigated should the decision of the court below be upheld, experience to date would indicate that by the most conservative estimate the figure will run into the hundreds, perhaps even into the thousands. The requisite finality of criminal proceedings upon which effective crime deterrence and law enforcement are drastically dependent, have been dealt yet another staggering blow. More importantly, the atmosphere of non-finality with its attendant state-guilt will seriously undermine and impede the sociological plateau upon which correctional rehabilitation must necessarily commence—the recognition of the individual inmates that the conduct for which they are incarcerated is the result of their own, and not the State's wrong doing. And to what end? Are the noble ideas of the Constitution properly served by judicial determinations that are at once both disruptive and piddling? The [Petitioner] submits that they are not, and adheres firmly to his belief that this Court will so agree.
>
> At best, the court below could complain of the Georgia charge on the ground that it was possibly confusing to the jury. (The confusion, if any did exist, would reasonably appear to have been more advantageous to the inmate than to the State, the most notable vice in that Georgia alibi charge being its tendency to overemphasize and overinstruct the jury on the alibi question . . .) In no event could

reasonable men really suppose that the Georgia alibi charge affected the integrity of the fact-finding procedure so as to call for retroactive application. In light of the disastrous effects of the court below's conclusion, the decision of the court below applying retroactively its conclusion as to the Georgia alibi charge should be reversed.

It is submitted that an application of the principles involving retroactivity, as developed in *Stovall v. Denno*, 388 U.S. 293 (1967), warrants the non-applicability of the previous lower court decisions to the instant case. See also *Mackey v. United States*, 401 U.S. 667 (1971). Since the extent of the reliance by law enforcement authorities on the old standard has been continuous in Georgia since the last century, *Harrison v. State*, 83 Ga. 129 (1889), and the effect on the administration of justice of a retroactive application of the new standards if adopted, would create a potentially unhandleable burden of retrial on the State, with resultant release of prisoners without retrial, the objection to the charge as given, if valid, should be given only prospective application.

The third criteria for considering this question is the purpose to be served by a new standard. It would appear that the purpose to be served by removing the objected-to portion from the charge on alibi would simply omit language which Respondent feels may have shifted the burden in the jury's minds. The suppositious nature of this contention shows that the purpose to be served by removing the language only cures a conjectural defect. It is only *assumed* that the jury is misled or confused by the objected-to portion of the charge. Not being a clear-cut or concrete deprivation of a constitutional protection, the ruling if upheld should for this reason also, be given only prospective application.

CONCLUSION

The issues involved here and in other petitions now pending in this Court, to wit: *Smith v. Smith,* No. 71-1148; *Caldwell v. Thornton,* No. .....; and *Caldwell v. Mathis,* No. ....., have become a most troublesome and disruptive problem in the administration of criminal justice. See the list of cases in *Smith v. Smith, supra,* Petition for Certiorari, Appendix F, and the additional list of cases appended hereto as Appendix D. The issue remains open as one of substantial importance in the administration of the criminal law. It is respectfully requested that this Court grant the writ of certiorari for the purpose of reviewing and reversing the decision of the Court of Appeals.

Respectfully submitted,

.....
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CERTIFICATE OF SERVICE

This is to certify that I, counsel of record for Petitioner herein and a member of the Bar of the Supreme Court of the United States, have this day served true and correct copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit together with a copy of the Petition for a Writ of Certiorari in the case of *Smith, Warden v. Smith*, U. S. Supreme Court No. 71-1148, by mail, by depositing same in a United States mail box, with first-class postage prepaid, addressed to the following, who constitutes all counsel of record.

Edward T. M. Garland, Esquire
Counsel for Respondent
Tenth Floor—Candler Building
Atlanta, Georgia 30301

This ..... day of April, 1972.

.....

COURTNEY WILDER STANTON

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-2512

Summary Calendar*

WILLIAM PAUL HIATT,

Petitioner-Appellant,

VERSUS

DOYAL SMITH, WARDEN, PUTNAM COUNTY PRISON,

Respondent-Appellee.

Appeal from the United States District Court for the Middle District of Georgia

---

(February 1, 1972)

Before THORNBERRY, MORGAN and CLARK, Circuit Judges.

PER CURIAM: On the basis of our decision in *Smith v. Smith*, 5th Cir. 1971, ... F.2d ..... [No. 71-1311, December 14, 1971], the judgment of the district court is REVERSED and the cause is REMANDED for a new trial.

---

*Rule 18, 5th Cir.; *see Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al*, 5th Cir. 1970, 431 F.2d 409, Part I.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court for a new trial in accordance with the opinion of this Court;

It is further ordered that respondent-appellee pay the costs on appeal in this Court.

February 1, 1972

Issued As Mandate:

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
MACON DIVISION

WILLIAM PAUL HIATT, *Petitioner,* v. DOYAL SMITH, WARDEN, PUTNAM COUNTY PRISON, *Respondent.*	CIVIL ACTION NO. 2661

[Opinion filed with Clerk July 9, 1971]

BOOTLE, Chief Judge:

This petitioner, confined under a state court sentence, by habeas corpus seeks release because of alleged errors in the trial Judge's charge to the jury. He obviously must show that "he is in custody in violation of the Constitution or laws . . . of the United States." 28 U.S.C. § 2254(a). "Habeas corpus does not lie to set aside a conviction on the basis of improper jury instructions unless the improperity is a clear denial of due process so as to render the trial fundamentally unfair." *Higgins v. Wainwright,* 424 F. 2d 177, 178 (5th Cir. 1970). Such error must be "so gross as to result in violation of petitioner's constitutional rights." *McDonald v. Sheriff of Palm Beach County, Florida,* 422 F. 2d 839, 840 (5th Cir. 1970). Such "improprieties [must] clearly show a denial of due process such as to deprive the petitioner of fundamental fairness." *Murphy v. Beto,* 416 F. 2d 98,

100 (5th Cir. 1969). In *Gomez v. Beto*, 402 F. 2d 766, 767 (5th Cir. 1968) *cert. den.* 89 S.Ct. 1217, the court said: "The state trial court's charge to the jury has a portion which, read out of context, would appear to be an instruction to find the defendant guilty. No objection was noted by defendant's counsel. . . . The belatedly claimed error in the state court's charge was certainly not so gross as to result in violation of the Constitution of the United States and thus to require discharge on habeas corpus. 28 U.S.C. § 2254." The Court of Appeals for the Fourth Circuit sums it up this way:

> "The points made in the present proceeding all pertain to state law, and in the context of the trial we find no indication of fundamental unfairness. We express no opinion as to the state court's resolution of the issues raised. Even if we were to disagree, we could not intervene by habeas corpus, when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights. Normally, the admissibility of evidence, the sufficiency of evidence, and *instructions to the jury* in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal." (Emphasis added). *Grundler v. State of North Carolina*, 283 F. 2d 798, 802 (4th Cir. 1960).

See also *LaBrasca v. Misterly*, 423 F. 2d 708, 709 (9th Cir. 1970).

The petition fails to allege that petitioner expressed any dissatisfaction with the charge at the time it was given or at any time since then until the filing of this

petition in this court. He justifies his failure to file any application in the state courts seeking relief from confinement upon the ground that the Supreme Court of Georgia has consistently upheld charges on alibi substantially the same as the charge here complained of, citing *Mathis v. Smith,* 227 Ga. 314 (1971) and *Smith v. Hightower,* 227 Ga. 144 (1971). For the purposes of this case we shall assume that petitioner has sufficiently exhausted, or rather is relieved from the necessity of exhausting, his state court remedies. See, *Davis v. Smith,* 430 F. 2d 1256, 1258 (5th Cir. 1970).

The portion of the charge complained of is as follows:

> "Alibi as a defense, involves the impossibility of the defendant's presence at the scene of the offense at the time of its alleged commission, and the range of evidence, facts and circumstances submitted to you in respect to time and place must be such as to reasonably exclude the possibility of the defendant's presence at the scene of the alleged crime at the time of the alleged occurrence. *Alibi as a defense must be established to the reasonable satisfaction of the jury.*
>
> "The Court charges you that when the defendant sets up, as a defense, alibi, *the burden is upon him to establish his defense of alibi to your reasonable satisfaction.* It must be such as to reasonably exclude the possibility of the presence of the defendant at the scene of the offence at the time of its commission, and when so established to the reasonable satisfaction of the Jury, it is the duty of the Jury to acquit. Evidence as to alibi should be considered by the Jury in connection with all of the other evidence in the case, giving it such weight and credit as you think it is entitled to receive, and if, on considering the evidence as a whole, the Jury should entertain a

reasonable doubt as to the guilt of the accused, it would be their duty to acquit."

Other significant portions of the charge are as follows:

"The charge of the court should be received and considered by you in its entirety, as a whole, as one body of law applicable to this case." . . . "

* * *

"You are the sole judges of the facts of the case. You are the sole judges of the credibility of the witnesses. You are the sole judges of the weight of the evidence. You are the sole judges of the guilt or innocence of the defendant."

* * *

"This defendant enters upon this trial with the presumption of innocence in his favor and this presumption remains with him until and unless the State shall overcome and remove it by the introduction of evidence and proof to you sufficient to convince your minds to a moral and reasonable certainty and beyond *a reasonable doubt* of the guilt of the accused."

* * *

"The burden of proof is on the State to prove every material allegation in this indictment. Under our law, in no sense is the defendant required to prove that he is innocent. As stated, he is presumed to be and remains so until the State proves his guilt, not by a mere preponderance of the evidence as in civil cases, but beyond *a reasonable doubt.*"

* * *

"The defendant entered upon the trial of this case with the presumption of innocence in his favor. That presumption of innocence remains with him throughout the trial, and upon it you should acquit him unless the State, by the introduction of evidence in your presence and hearing, during the course of

the trial has removed that presumption of innocence, and satisfied your minds and consciences of his guilt beyond *a reasonable doubt.*" (Emphasis added).

Then comes the portion of the charge complained of by petitioner as follows:

"Alibi as a defense, involves the impossibility of the defendant's presence at the scene of the offense at the time of its alleged commission, and the range of evidence, facts and circumstances submitted to you in respect to time and place must be such as to reasonably exclude the possibility of the defendant's presence at the scene of the alleged crime at the time of the alleged occurrence. Alibi as a defense must be established to the reasonable satisfaction of the jury.

"The Court charges you that when the defendant sets up, as a defense, alibi, the burden is upon him to establish his defense of alibi to your reasonable satisfaction. It must be such as to reasonably exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission, and when so established to the reasonable satisfaction of the Jury, it is the duty of the Jury to acquit. Evidence as to alibi should be considered by the Jury in connection with all of the other evidence in the case, giving it such weight and credit as you think it is entitled to receive, and if, on considering the evidence as a whole, the Jury should entertain *a reasonable doubt* as to the guilt of the accused, it would be their duty to acquit." (Emphasis added).

Then the charge continues:

"The court charges you if you believe beyond *a reasonable doubt* that at any time within seven years next preceding the date this bill of indictment

> was returned by the Grand jurors [the defendant did threaten to shoot, etc] . . ., and further, if you believe beyond *a reasonable doubt* that said pistol was an offensive weapon, . . . then and in such event you would be authorized to find the defendant guilty of robbery as charged in this bill of indictment.
>
> "The court charges you, if you have *a reasonable doubt* as to the defendant's guilt of the offense of robbery as charged in this bill of indictment, it would be your duty to give him the benefit of that doubt and to acquit him."
>
> * * *
>
> "If you acquit the defendant, or if you have *a reasonable doubt* about the defendant's guilt, the form of your verdict would be: 'We, the Jury, find the defendant, William Paul Hiatt, not guilty.'" (Emphasis added).

Whether or not there is any error at all in the charge complained of it is not necessary for this court to decide. The question here is not whether the trial court committed error in its charge, but whether it committed such gross or egregious error as to constitute a denial to defendant of due process of law under the United States Constitution. As the Court of Appeals for the Fourth Circuit in *Grundler,* said:

> "We express no opinion as to the state court's resolution of the issues raised. Even if we were to disagree, we could not intervene by habeas corpus, when the alleged errors are of a character that cannot reasonably be said to involve a deprivation of constitutional rights." At 802.

Thus, if we assume arguendo that there is possibly some error in the trial court's charge, or some lack of clarity, or some ambiguity which could possibly give

rise to confusion, nevertheless, this petition for writ of habeas corpus must be denied and dismissed because such error, if any error there be, pertains to state law and does not rise or sink to constitutional proportions.

A reference to the charge shows that the jury was instructed very clearly that the petitioner entered upon his trial with the presumption of innocence in his favor and that that presumption remained with him until and unless the state should overcome and remove it by the introduction of evidence and proof sufficient to convince the jurors to a moral and reasonable certainty and beyond a reasonable doubt of the guilt of the accused, and that in no sense was the petitioner required to prove that he was innocent. The necessity for proof of guilt beyond a reasonable doubt was repeated over and over in the charge and the words "reasonable doubt" being repeated no less than eight times in the main charge and no less than four times in the supplemental charge.

Actually it may well be that the two paragraphs of the charge complained of relating to alibi as a defense was helpful to petitioner rather than harmful. It made it clear to the jury that alibi could be established to the "reasonable satisfaction of the jury" and thus was not required to be established either beyond a reasonable doubt or by a preponderance of the evidence. The defense of alibi, while negativing and rebutting the state's proof of presence at the scene of the crime, is really more than that in that it is an attempt by a defendant to prove that he was elsewhere and specifically where else he was. This is an undertaking on the part of the defendant and since it is his undertaking it may well be questioned whether he is harmed at all by an instruction that it is his onus or his burden to prove what he

proposes to prove. Of course, it would be error of constitutional proportions to charge the jury that if he failed in that proof he must be convicted, but the charge complained of contains no such intimation. First of all, it tells the jury that if the defense is established then regardless of all other considerations, regardless of what the state has proved, regardless of how much evidence the state has adduced, "it is the duty of the jury to acquit." The charge thus makes the defense of alibi a perfect and complete defense if it is established by the lowest quantum of proof possible, namely, "to the reasonable satisfaction of the jury." And then of great importance follows the concluding sentence of the portion of the charge objected to:

> "Evidence as to alibi should be considered by the Jury in connection with all of the other evidence in the case, giving it such weight and credit as you think it is entitled to receive, and if, on considering the evidence as a whole, the Jury should entertain a reasonable doubt as to the guilt of the accused, it would be their duty to acquit."

Certainly, whatever error there is, if any, in this charge does not rise to constitutional proportions.

Apparently the charge complained of has been the law of Georgia for more than eighty years. In the leading case of *Harrison v. The State*, 83 Ga. 129 (3), decided in 1889, the Supreme Court of Georgia, in an opinion written by Chief Justice Bleckley, after reviewing a number of cases previously decided as therein set forth summarized and expressly approved the law as set forth in the third headnote of that decision as follows:

> "Touching *alibi*, the rule in Georgia as established by authority consists of two branches. The first is,

> that to overcome proof of guilt strong enough to exclude all reasonable doubt, the *onus* is on the accused to verify his alleged *alibi*, not beyond reasonable doubt, but to the reasonable satisfaction of the jury. The second is that, nevertheless, any evidence whatever of *alibi* is to be considered on the general case with the rest of the testimony, and if a reasonable doubt of guilt be raised by the evidence as a whole, the doubt must be given in favor of innocence. In sense and substance, the charge of the court in the present case conformed to the rule, certainly to the latter branch of it."

The substance of the charge here complained of has been repeatedly approved by the supreme court ever since 1889, and as recently as the case of *Thornton v. State*, 226 Ga. 837 (1970).

The litigation and adjudications in the Eighth Circuit recently[1] revolved about a somewhat similar and yet quite different view of the state courts of Iowa concerning the law of alibi. The Supreme Court of Iowa in an opinion reported in 264 N.W. at 602, as copied in *Johnson v. Bennett*, 414 F. 2d 50, 51 (8th Cir. 1969) expressed its alibi rule as follows:

> "'An alibi is an affirmative defense; the burden of proof is upon the person setting up an alibi to prove it by a preponderance of evidence. Of course, if the whole record raises a reasonable doubt of his guilt, he may be found not guilty. The instructions in this case in regard to the alibi did not go as far as such instructions many times rightfully go. The court might very well have told the

[1]See *Johnson v. Bennett*, 386 F. 2d 677 (8th Cir. 1967); *Stump v. Bennett*, 398 F. 2d 111 (8th Cir. 1968); *Johnson v. Bennett*, 393 U. S. 253, 21 L. Ed. 2d 415 (1968), and *Johnson v. Bennett*, 414 F. 2d 50 (8th Cir. 1969).

> jury, in addition to what he said about an alibi, that the evidence of an alibi should be scanned with caution; that it is a defense easily manufactured.'"

The differences between the Iowa rule and the Georgia rule are twofold: first, Iowa requires proof of alibi by preponderance of evidence, Georgia only to the reasonable satisfaction of the jury, see *Bone v. The State*, 102 Ga. 387, 393 (1897); second, the courts in Iowa instruct the juries that evidence of an alibi should be scanned with caution; Georgia has no such rule.

This court cannot bring itself to a holding that all of the courts of Georgia from the Supreme Court on down trying or reviewing criminal cases have for more than three-quarters of a century denied due process of law to all defendants appearing before them and relying upon alibi as a defense. The standard jury instruction on alibi has no such effect. It has no such meaning in the minds of Georgia judges, nor is it understood to have any such meaning or effect by Georgia lawyers. It simply means that if a defendant charged with being at point A, the scene of the crime, when the crime was committed is not content simply to deny his presence there but chooses to create the issue that he was actually at point B at the time the crime was committed, he has some obligation if he wants to convince the jury that he was actually at point B so to convince them not beyond a reasonable doubt, not by a preponderance of the evidence, but at least to the satisfaction of the jury. If he is to establish the fact that he was actually at point B how can he do so except to the satisfaction of the jury. Under the standard charge as given in this case, if he wins on that point he has carried the day, regardless of how much evidence the state has produced against him and regardless of any and all other considerations, factual

or legal, but if he loses on that point his battle is not lost and he is right back where he would have been had no defense of alibi been asserted, with the additional advantage, however, of having the jury instructed that whatever evidence he offered in support of his alibi must still be considered by them in determining whether or not the state has proved his guilt beyond a reasonable doubt.

> "Though the burden was the defendant's to show alibi to the satisfaction of the jury, and on that issue reasonable doubts would not avail him, yet, on the final issue of guilty or not guilty . . . all the evidence is for the consideration of the jury, and it is for them to say whether, from all of it, he is guilty beyond a reasonable doubt." *Ledford v. The State of Georgia,* 75 Ga. 856, 858 (1885).

But if we assume that under no circumstances can the court say to the jury that a defendant who pleads that he was at point B has any burden, onus, or responsibility with respect to establishing such contention, nevertheless a court in doing so would be committing only a procedural error with respect to a matter of state law and would not be depriving such defendant of due process of law under the Constitution of the United States. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak v. United States,* 344 U. S. 604, 619, 97 L. Ed. 593, 605 (1953).

Steeped in the doctrine of *Falgout v. United States,* 279 Fed. 513 (5th Cir. 1922), (see *Thomas v. United States,* 213 F. 2d 30 (9th Cir. 1954)), and accustomed to charge in accordance therewith, this court is a little reluctant to say that the charge petitioner complains of was entirely free of error, but is entirely convinced that

any error therein does not rise to constitutional proportions.

Since the facts are not in dispute, and taking the petition at face value, and having thoroughly considered petitioner's brief filed therewith, convinced that the petition sets forth no grounds for his release from custody, the court hereby denies the petition and dismisses the same without a hearing.

This 8th day of July, 1971.

/s/ W. A. BOOTLE

Chief Judge

APPENDIX C

CHARGE OF THE COURT

Gentlemen of the Jury, you have been trying the case of The State of Georgia against William Paul Hiatt, who is charged in this Indictment with the offense of Robbery.

The Grand Jurors selected, chosen and sworn, for the County of Cobb, whose names appear on this Indictment, returned into this Court on the 21st day of March, 1969, the following Indictment, to wit: In the name and behalf of the citizens of Georgia, charge and accuse William Paul Hiatt with the offense of Robbery, for that the said accused on the 22nd day of February, in the year of our Lord, One Thousand Nine Hundred and Sixty-Nine, in the County aforesaid, with force, and arms, did unlawfully then and there feloniously, wrongfully, fraudulently and violently take from the person of Bonnie Jane Moore, without her consent, she being the owner, the person in control and possession of following described personal property to-wit: Lawful coins and currency of the United States of America of a value of $14.00, with the intent then and there to steal the same; the aforesaid taking of the said described property having been accomplished by said accused by offering and threatening to shoot one Bonnie Jane Moore with a replica, article and device having the appearance of a pistol and the appearance of being a weapon likely to produce death when used in its usual and customary manner, contrary to the laws of this state, and good order, peace and dignity thereof.

These are the allegations gentlemen of the Jury, of the Bill of Indictment. These allegations constitute no

proof of the truthfulness and correctness thereof. These allegations constitute no proof of any matter, except that it was returned into this Court by the Grand Jury, on the 21st day of March, 1969.

To this Bill of Indictment, the defendant is on trial. The defendant has entered his Plea of Not Guilty. The Defendant's Plea of Not Guilty is no evidence of his innocence.

The allegations of the Bill of Indictment, together with the Defendant's Plea of Not Guilty thereon constitute, formulate and establish the issues which you are called upon to try, and, by your verdict, to determine, namely, whether the Defendant, William Paul Hiatt, be guilty or innocent of the crime of Robbery, as charged in said Indictment.

It now becomes the duty of the Court to instruct you as to the principles of law applicable to this case. You will take these principles of law, as given in charge by the Court, apply them to the facts of the case, as you ascertain the facts to be from the proceedings had before you, and in that way make up your verdict in the case.

The word, verdict, relates to truth and has reference to the truth of the case as ascertained by the Jury, as reduced to writing by the Jury, in their verdict, and thus brought into Court for publication.

Under our system, it is the duty and responsibility of the Court, that is, the Judge presiding, to ascertain the law applicable to a case and to instruct the jury of what the law consists.

Under our system, it is the duty and responsibility of

the Jury trying the case to ascertain the truth of the case from a factual standpoint from the evidence adduced before the jury. And, then, it is the further duty and responsibility of the jury to apply the law, as given in charge, to the facts, as thus ascertained by them, and by this application of law to fact and of fact to law to arrive at a verdict in the case.

By no ruling which the Court has made during the progress of the trial before you has the Court intimated or expressed any opinion upon the facts of this case, upon the credibility of the witnesses, upon the weight of the evidence or upon the guilt or innocence of the defendant.

By no portion of this charge will the Court intimate or express any opinion upon any of these matters, each and all of which belong exclusively to you for your judgment and your determination.

The Court states the law; you find the facts. You apply the one to the other and in that way decide the case.

The charge of the court should be received and considered by you in its entirety, as a whole, as one body of law applicable to this case. Such repetition as may occur during the progress of the charge will not take place for the purpose of emphasizing the principle or principles of law repeated over other principles of law, but such repetition as does occur will take place simply in order to better enable the Court to expound the law to you as the charge progresses in your presence.

You are the sole judges of the facts of the case. You are the sole judges of the credibility of the witnesses. You are the sole judges of the weight of the evidence.

You are the sole judges of the guilt or innocence of the defendant.

I caution you gentlemen of the jury, that an indictment does not constitute evidence, nor does the fact that a Grand Jury has returned an indictment against the defendant constitute any evidence or inference of guilt. It is merely the manner in which the charge is brought before the Court for trial on its merits, as revealed in your presence and hearing.

The defendant has filed his plea of Not Guilty to this Indictment whereby he denies the charge and places the burden on the State to prove its case under the instructions given you by the Court.

In criminal cases gentlemen of the Jury, you are the judges of both the law and the facts. The law will be given you in charge by the Court and you are bound by it, except you are the judges of it in applying it to the facts as you find them to be from the evidence developed in the case.

This defendant enters upon this trial with the presumption of innocence in his favor and this presumption remains with him until and unless the State shall overcome and remove it by the introduction of evidence and proof to you sufficient to convince your minds to a moral and reasonable certainty and beyond a reasonable doubt of the guilt of the accused.

Moral and reasonable certainty is all that can be expected in a legal investigation. A reasonable doubt means just what it says. It is not an imaginary, fanciful or arbitrary doubt, it is not a bare possibility of doubt, but it is the doubt of a fair-minded impartial juror honestly seeking the truth. It may arise from the evidence

or from a lack of evidence or from a conflict of the evidence or conflict between the witnesses.

The burden of proof is on the State to prove every material allegation in this indictment. Under our law, in no sense is the defendant required to prove that he is innocent. As stated, he is presumed to be and remains so until the State proves his guilt, not by a mere preponderance of the evidence as in civil cases, but beyond a reasonable doubt.

A number of witnesses have been sworn and testified in this case. The law directs that it is your duty where it can be done, to reconcile the conflicts in the evidence and testimony of witnesses, if any, so as to make all speak the truth and perjury and falsehood be imputed to none of them.

However, if you cannot do that, it becomes your duty to believe that witness or those witnesses or the evidence you think best entitled to belief.

You are the sole judges of the credibility of each and every witness who has sworn and testified in this case. In passing upon credibility in deciding which are best entitled to belief, where there is a conflict, if you find a conflict, you may consider all of the facts and circumstances of the case, the witnesses' manner of testifying, their intelligence, their means and opportunity for knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony, their interest, their want of interest, and also their personal credibility so far as the same may appear from the trial of the case.

The defendant entered upon the trial of this case with the presumption of innocence in his favor. That presump-

tion of innocence remains with him throughout the trial, and upon it you should acquit him unless the State, by the introduction of evidence in your presence and hearing, during the course of the trial, has removed that presumption of innocence, and satisfied your minds and consciences of his guilt beyond a reasonable doubt.

Now, gentlemen, I charge you that the object of all legal investigations is the discovery of the truth. Evidence in that search is of two kinds. Direct evidence is that which immediately points to the question in issue. Indirect or circumstantial evidence is that which only tends to establish the issue by proof of various facts sustaining by their consistency the hypothesis or conclusion claimed.

Indirect or circumstantial evidence is that which does not within itself establish the ultimate facts, but does establish facts and circumstances from which, according to the common experience of mankind, a reasonable inference may be drawn of the actual existence of such ultimate fact in issue.

When circumstantial evidence alone is relied upon to establish the facts, the evidence must be such as to exclude every other reasonable theory, save that of the guilt of the accused.

The comparative weight of circumstantial or indirect evidence on any given issue is a question of fact for the determination of the Jury. However, before you would be authorized to convict on circumstantial evidence alone, the proven fact must not only be consistent with the hypothesis or conclusion of guilt, but must exclude every other reasonable hypothesis or conclusion except that of the guilt of the accused.

A conviction may not rest upon suspicion, conjecture, or possibility of guilt. Where all of the facts and circumstances of the case and all reasonable deductions therefrom present two theories, one of the innocence and the other of guilt, then the Jury should acquit.

Alibi as a defense, involves the impossibility of the defendant's presence at the scene of the offense at the time of its alleged commission, and the range of evidence, facts and circumstances submitted to you in respect to time and place must be such as to reasonably exclude the possibility of the defendant's presence at the scene of the alleged crime at the time of the alleged occurrence. Alibi as a defense must be established to the reasonable satisfaction of the Jury.

The Court charges you that when the defendant sets up, as a defense, alibi, the burden is upon him to establish his defense of alibi to your reasonable satisfaction. It must be such as to reasonably exclude the possibility of the presence of the defendant at the scene of the offense at the time of its commission, and when so established to the reasonable satisfaction of the Jury, it is the duty of the Jury to acquit. Evidence as to alibi should be considered by the Jury in connection with all of the other evidence in the case, giving it such weight and credit as you think it is entitled to receive, and if, on considering the evidence as a whole, the Jury should entertain a reasonable doubt as to the guilt of the accused, it would be their duty to acquit.

The offense charged in this bill of indictment is that of robbery. The court charges you: robbery is the wrongful, fraudulent and violently taking of money, goods or chattels from the person of another, by use of an offensive weapon, without the consent of the

owner or person in possession or control thereof, with intent to steal the same. The use of or offer to use an offensive weapon, or a weapon likely to produce death when used in its usual customary manner, or any replica, article or device having the appearance of such weapon, shall constitute robbery by use of an offensive weapon.

The law provides that robbery by use of an offensive weapon shall be punished by death unless the jury recommends mercy, in which event punishment shall be imprisonment for life, provided, however, the jury in all cases may fix the punishment by imprisonment and labor in the penitentiary for not less than four years and not more than twenty years. The court charges you that in this particular case the State has waived the death penalty. Therefore, you will not be concerned with the death penalty.

The court charges you if you believe beyond a reasonable doubt that at any time within seven years next preceding the date this bill of indictment was returned by the Grand Jurors named therein and filed in this court, that this defendant did, in the County of Cobb and State of Georgia, wrongfully, fraudulently and violently, by offering and threatening to shoot one Bonnie Jane Moore with a pistol which the accused exhibited, the same being a replica, article or device having the appearance of an offensive weapon and one likely to produce death when used in its usual and customary manner, and by offering and threatening to shoot the said Bonnie Jane Moore with an article, replica and device having the appearance of a pistol, and offensive weapon, which accused exhibited, and by intimidation, take from the person of the said Bonnie Jane Moore without her consent and with intent to steal the same, lawful currency

of the United States of America, the value of $14.00, or any proven value, and in the possession, custody and control of Bonnie Jane Moore, and that said defendant in thus taking said money from the person of Bonnie Jane Moore did offer and threaten to shoot the said Bonnie Jane Moore with such a pistol, replica, article and device as described in this indictment, in thus taking said money from her, and further, if you believe beyond a reasonable doubt that said pistol was an offensive weapon, or a weapon likely to produce death when used in its usual and customary manner or was such a replica, article or device having the appearance of such weapon, then and in such event you would be authorized to find the defendant guilty of robbery as charged in this bill of indictment.

The court charges you, if you have a reasonable doubt as to the defendant's guilt of the offense of robbery as charged in this bill of indictment, it would be your duty to give him the benefit of that doubt and to acquit him.

In the event you find the defendant guilty of robbery as charged, you would have a right to recommend him to the mercy of the court, and if you find him guilty of robbery by use of an offensive weapon as charged, and if you desire to recommend him to the mercy of the court, then and in such event the form of your verdict would be as follows: "We, the Jury, find the defendant, William Paul Hiatt, guilty of robbery by use of an offensive weapon, and we recommend him to the mercy of the Court. Should you return that form of verdict, it would mean the defendant would receive a sentence of imprisonment and labor in the penitentiary for life.

In the event you find the defendant guilty of robbery by use of an offensive weapon, you would have a right to fix his punishment at or within the limits prescribed by law for robbery, those limits being imprisonment and labor in the penitentiary for not less than four years nor more than twenty years. If you find this defendant guilty of robbery by use of an offensive weapon and if you recommend him to the mercy of the Court and if you desire to fix the punishment he would receive at or within the limits prescribed by law, then and in such event the form of your verdict would be as follows: We, the jury, find the defendant guilty of robbery by use of an offensive weapon and we recommend him to the mercy of the Court and we fix his punishment at blank years. Now where the Court has used the word, "blank", you would substitute therefor the punishment fixed by the jury, the law being that if you find him guilty under those circumstances and desire to fix his punishment that he would receive at or within the limits prescribed by law, it would then be your duty to fix the punishment he would receive at or within the limits prescribed by law. If you find him guilty under those circumstances, you would have a right to fix his punishment at four years, or you would have a right to fix his punishment at twenty years, or you would have a right to fix his punishment at any period of time between four years and twenty years.

By way of illustration and illustration alone, and not by way of intimating to you as to what your verdict should or should not be, that matter being entirely for your determination, but should you find the defendant guilty of robbery by use of an offensive weapon, and if you desire to fix his punishment as heretofore outlined

to you by the court, you would have a right to fix his punishment at four years, eight years, or at twelve years, or seventeen years, or at twenty years. If you find him guilty under those instructions, you would have a right to fix his punishment at any period of time so long as the punishment fixed by you would be not less than four years and so long as the punishment fixed by you would not be greater than twenty years.

In the event that you find this defendant guilty of robbery by use of an offensive weapon, as charged in this bill of indictment, you would have a right to recommend that he be punishment as for a misdemeanor. Should you find him guilty as charged and should you desire to recommend he be punished as for a misdemeanor, then, in such event, you would add to the form of your verdict, as I have given you in charge already, in substance the following words: "and we recommend he be punished as for a misdemeanor." You would first fix the punishment, as I have charged you before, if you find him guilty, and the form that I have already detailed to you, and you would add the recommendation: "and we recommend that it be treated as for a misdemeanor".

Should you find him guilty as charged and should you recommend he be punished as for a misdemeanor, it would be discretionary with the court as to whether the court would or would not follow the misdemeanor recommendation, if one was made. If you should find him guilty as charged, and if you should recommend that he be punished as for a misdemeanor, and if the court should see fit to follow the misdemeanor recommendation, it would mean that he would receive the punishment prescribed by law for a misdemeanor. On the other

hand, if you should find him guilty as charged; that is, robbery by use of an offensive weapon; and if you should recommend he be punished as for a misdemeanor, and if the court declines to follow the misdemeanor recommendation, as the court would have a right to do, it would then mean the defendant would receive the punishment prescribed by law, by you, the Jury, in your verdict.

If you acquit the defendant, or if you have a reasonable doubt about the defendant's guilt, the form of your verdict would be: "We, the Jury, find the defendant, William Paul Hiatt, not guilty."

Your verdict should be in writing, it should be entered upon the indictment in this case, it should be dated, it should be signed by one of your members as foreman, and returned into Open Court.

Now, Gentlemen, we are right at the noon hour, and we have made provisions that you will be fed, that you will be kept together during the noonhour, and during the time that you are out of the presence of the court and before you return to the Juryroom to consider the case, you will not discuss the case among yourselves, nor allow anyone to discuss it in your presence and hearing, in other words, don't consider the case and don't deliberate on the case and don't discuss the case until you return to the Juryroom. At all times, let your deliberations and your discussions of this case, take place in the Juryroom.

With those instructions, I will let you go to the Juryroom, and just as soon as the bailiff has made the provisions for caring for you during the noonhour, he will take you for your meal and then return you after you

have finished your meal to the Juryroom. At that time you can begin your deliberations on the case.

You may retire at this time.

(The Jury was retired.)

THE COURT: Gentlemen, we will be in recess until 1:15.

(A recess was taken at this point.)

THE COURT: Bring the Jury in.

(The Jury was returned into open court.)

THE COURT: Gentlemen, I understand that you have some questions that you want to ask the Court about?

FOREMAN: Yes, sir.

THE COURT: Is it a question of law or a question of fact?

FOREMAN: We would like to have you to read the last portion of your charge to the Jury relating to the sentencing of guilty or not guilty.

THE COURT: You mean the forms of the verdict?

FOREMAN: Yes, sir; the forms of the verdict relating to both the guilty portion and the not guilty.

THE COURT: I presume you want it all the way through?

FOREMAN: Yes, sir; if it please.

THE COURT: All right.

"The court charges you, if you believe beyond a reasonable doubt, that at any time within seven years next preceding the date of this bill of indictment was

returned by the Grand Jurors named therein and filed in this court, that this defendant did, in the County of Cobb and State of Georgia, wrongfully, fraudulently and violently, by offering and threatening to shoot one Bonnie Jane Moore with a pistol which the accused exhibited, the same being a replica, article or device having the appearance of an offensive weapon and one likely to produce death when used in its usual and customary manner, and by offering and threatening to shoot the said Bonnie Jane Moore with an article, replica and device having the appearance of a pistol, and offensive weapon, which accused exhibited, and by intimidation, take from the person of the said Bonnie Jane Moore without her consent and with intent to steal the same, lawful currency of the United States of America, the value of $14.00, or any proven value and in the possession, custody and control of Bonnie Jane Moore, and that said defendant in thus taking said money from the person of Bonnie Jane Moore did offer and threaten to shoot the said Bonnie Jane Moore with such a pistol, replica, article and device as described in this indictment, in thus taking said money from her, and further, if you believe beyond a reasonable doubt that said pistol was an offensive weapon, or a weapon likely to produce death when used in its usual and customary manner or was such a replica, article or device having the appearance of such weapon, then and in such event you would be authorized to find the defendant guilty of robbery as charged in this bill of indictment.

"The court charges you, if you have a reasonable doubt as to the defendant's guilt of the offense of robbery as charged in this bill of indictment, it would be your duty to give him the benefit of that doubt and to acquit him.

"In the event you find the defendant guilty of robbery as charged, you would have a right to recommend him to the mercy of the court, and if you find him guilty of robbery by use of an offensive weapon as charged, and if you desire to recommend him to the mercy of the court, then and in such event the form of your verdict would be as follows: "We, the Jury, find the defendant, William Paul Hiatt, guilty of robbery by use of an offensive weapon, and we recommend him to the mercy of the Court. Should you return that form of verdict, it would mean the defendant would receive a sentence of imprisonment and labor in the penitentiary for life.

"In the event you find the defendant guilty of robbery by use of an offensive weapon, you would have a right to fix his punishment at or within the limits prescribed by law for robbery, those limits being imprisonment and labor in the penitentiary for not less than four years nor more than twenty years. If you find this defendant guilty of robbery by use of an offensive weapon and if you recommend him to the mercy of the Court and if you desire to fix the punishment he would receive at or within the limits prescribed by law, then and in such event the form of your verdict would be as follows: We, the jury, find the defendant guilty of robbery by use of an offensive weapon and we recommend him to the mercy of the Court and we fix his punishment at blank years. Now, where the Court has used the word, "blank", you would substitute therefor the punishment fixed by the jury, the law being that if you find him guilty under those circumstances and desire to fix his punishment that he would receive at or within the limits prescribed by law, it would then be your duty to fix the punishment he would receive at or

within the limits prescribed by law. If you find him guilty under those circumstances, you would have a right to fix his punishment at four years, or you would have a right to fix his punishment at twenty years, or you would have a right to fix his punishment at any period of time between four years and twenty years.

"By way of illustration and illustration alone, and not by way of intimating to you as to what your verdict should or should not be, that matter being entirely for your determination but should you find the defendant guilty of robbery by use of an offensive weapon, and if you desire to fix his punishment as heretofor outlined to you by the court, you would have a right to fix his punishment at four years, eight years, or at twelve years, or seventeen years, or at twenty years. If you find him guilty under those instructions, you would have a right to fix his punishment at any period of time so long as the punishment fixed by you would be not less than four years and as long as the punishment fixed by you would not be greater than twenty years.

"In the event that you find this defendant guilty of robbery by use of an offensive weapon, as charged in this bill of indictment, you would have a right to recommend that he be punished as for a misdemeanor. Should you find him guilty as charged and should you desire to recommend he be punished as for a misdemeanor, then, in such event, you would add to the form of your verdict, as I have given you in charge already, in substance the following words: "and we recommend he be punished as for a misdemeanor." You would first fix the punishment, as I have charged you before, if you find him guilty, and the form that I have already detailed to you, and you would add the recommendation:

"and we recommend that it be treated as for a misdemeanor."

"Should you find him guilty as charged and should you recommend he be punished as for a misdemeanor, it would be discretionary with the court as to whether the court would or would not follow the misdemeanor recommendation, if one was made. If you should find him guilty as charged, and if you should recommend that he be punished as for a misdemeanor, and if the court should see fit to follow the misdemeanor recommendation, it would mean that he would receive the punishment prescribed by law for a misdemeanor. On the other hand, if you should find him guilty as charged; that is, robbery by use of an offensive weapon; and if you should recommend he be punished as for a misdemeanor, and if the court declines to follow the misdemeanor recommendation, as the court would have a right to do, it would then mean the defendant would receive the punishment prescribed by law, by you, the Jury, in your verdict.

"If you acquit the defendant, or if you have a reasonable doubt about the defendant's guilt, the form of your verdict would be: "We, the Jury, find the defendant, William Paul Hiatt, not guilty."

As I charged you before, your verdict should be in writing, it should be entered upon the indictment in the case, it should be dated, it should be signed by one of your members as foreman, and returned in Open Court.

Now, does that cover all the forms of the verdict, Gentlemen?

FOREMAN: Thank you, Judge, Your Honor.

THE COURT: All right. You may now retire.

(The Jury was retired and a recess taken at this point.)

THE COURT: Bring the Jury back.

(The Jury was returned into Open Court.)

THE COURT: Gentlemen, I understand you have a further problem about the sentence?

FOREMAN: Yes, sir, Judge, we are not—we don't understand and we don't know whether we are in order to ask about certain aspects of a sentence. We understand the term "misdemeanor" and, as opposed to not a misdemeanor. We don't know how much —

THE COURT: Well, a misdemeanor punishment is a matter that would not relate itself to the Jury, that is a punishment that is fixed by the court. The maximum is $1000 fine or 12 months service in prison, and that is the maximum, or any combination, but that would be one within the discretion of the court, the Jury couldn't do it.

Now, I have charged you that in the event you desire to make a recommendation for misdemeanor punishment in this case, that you would first have to fix a sentence for the offense of robbery, within the term from four to twenty years, or life imprisonment, and then recommend it be treated as a misdemeanor and the court could follow that if it saw fit, or the court could disregard that if it saw fit. If the court saw fit, then, the sentence that you had fixed without the recommendation would be the one he would receive. If the court saw fit to follow your recommendation, then the sentence would be within the discretion of the court and that would be within a sentence of 12 months in the public works camp, or a $1000 fine, or any combination that the court saw fit to impose.

FOREMAN: We understand now, I think.

THE COURT: All right, sir.

MR. JOHNSON: I believe it is —

THE COURT: Wait just a minute.

MR. JOHNSON: I believe it is 12 months and a $1000.

THE COURT: It is, or any combination.

MR. JOHNSON: For a misdemeanor, he can get 12 months and a $1000.

THE COURT: Or both — just a minute. Gentlemen, the defense counsel is uncertain of the combination of the possible punishment that I could impose.

In the event you found the defendant guilty and fixed his punishment as I have directed that you would have to fix it, then, recommended misdemeanor punishment, I could impose a fine of a maximum of $1000 and twelve months, or a fine or imprisonment; any combination. In other words, I would not be confined to a fine alone or imprisonment alone, or I could impose both punishments.

FOREMAN: Yes, sir.

THE COURT: Mr. Johnson, does that straighten it out?

MR. JOHNSON: Yes, sir.

THE COURT: All right.

(The Jury was retired and a recess taken at this point.)

THE COURT: Bring the Jury in.

(The Jury was returned into Open Court.)

THE COURT: Mr. Foreman, have you agreed upon a verdict?

FOREMAN: Yes, sir, Your Honor.

THE COURT: Mr. Clerk, receive and publish the verdict.

CLERK: This is Case No. 2496, The State versus William Paul Hiatt. "We, the Jury, found the Defendant Guilty. This 20th day of August 1969. Signed Albert S. Cooey, Foreman. We, the Jury, find the Defendant Guilty of robbery by an offensive weapon and fix sentence at four years with a recommendation to the court that the case be treated as a misdemeanor. Also signed Albert S. Cooey, Foreman, and dated the 20th of August."

THE COURT: Any reason why sentence shouldn't be pronounced?

MR. JOHNSON: No, sir, Your Honor.

THE COURT: All right. Bring Mr. Hiatt around.

Mr. Hiatt, I first started prosecuting you as a Solicitor General when you were just a kid, in 1962. I believe maybe went back a little bit further than that. You have been constantly before the Court ever since you first started up here and you haven't slowed down one bit. You started off with automobile or traffic offenses, then you got into writing checks, forgery, and then you have been in this, this fraud down in Atlanta, this United Helping Hand, you have been in the prostitution racket, you have been in just about everything that has been wrong and corrupt in this community. You have had sentences to prison and it hasn't taught you anything. I am sure the Jury will understand why I give you the sentence of four years and disregard the recommendation of misdemeanor punishment.

So, that is the sentence of the Court.

Take him away.

APPENDIX D

PENDING CASES INVOLVING THE CHARGE ON ALIBI GIVEN TO JURIES IN GEORGIA CRIMINAL TRIALS (IN ADDITION TO APPENDIX F, PETITION FOR WRIT OF CERTIORARI, *S. LAMONT SMITH, WARDEN V. JACK HENRY SMITH*, UNITED STATES SUPREME COURT, 1971 TERM, NO. 71-1148).

DIRECT APPEALS

1. Court of Appeals of Georgia: *Butler v. State*, No. 46990, decided April 3, 1972.

2. Supreme Court of Georgia: *Earnest Payton v. State*, No. 27221, pending briefs and argument.

COLLATERAL REVIEW

1. United States Court of Appeals for the Fifth Circuit: *David Hugh Clements v. Leroy Stynchcombe*, No. 71-1997, appeal from Northern District of Georgia, affirmed February 1, 1972.

2. United States District Court, Northern District of Georgia, Atlanta Division: *Amos Lumpkin v. E. B. Caldwell, Warden*, Civil Action No. 15959.

3. United States District Court, Northern District of Georgia, Atlanta Division: *Ralph Connelly v. E. B. Caldwell, Warden*, No. 16252, pending.

4. United States District Court, Northern District of Georgia, Atlanta Division: *Emory N. Brown v. E. B. Caldwell, Warden*, No. 15600, stayed pending decision

of United States Supreme Court in *Smith v. Smith*, No. 71-1148.

5. United States District Court, Northern District of Georgia, Atlanta Division: *William T. Poss v. E. B. Caldwell, Warden*, No. 16307, pending. [This follows denial of writ of certiorari by United States Supreme Court on February 22, 1972, in *Poss v. Smith*, No. 71-5639.]

6. United States District Court, Northern District of Georgia, Atlanta Division: *Charles Oscar Tolbert v. Caldwell*, No. 15509. Stayed April 13, 1972.

7. United States District Court, Northern District of Georgia, Atlanta Division: *Joseph Quick v. E. B. Caldwell, Warden*, No. .

8. Tattnall Superior Court: *George Nolley v. E. B. Caldwell, Warden*, No. 71-60; order and judgment filed March 30, 1972, denying habeas corpus.

9. Tattnall Superior Court: *James Wynne v. E. B. Caldwell, Warden*, No. ; petition filed April 13, 1972, hearing set for May, 1972.

10. Tattnall Superior Court: *Russell Mosely v. E. B. Caldwell, Warden*, No. 72-2, pending.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1971

NO. 71-1391

DOYAL SMITH, WARDEN,
GEORGIA STATE PRISON,

Petitioner,

vs.

WILLIAM PAUL HIATT,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The respondent, William Paul Hiatt, respectfully prays that this court not issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals entered in this proceeding on

February 1, 1972.

QUESTION PRESENTED

Was the charge to the jury that alibi must be established by the defendant to the reasonable satisfaction of the jury error for the reason that it shatters the presumption of innocence, creates confusion in the minds of the jury, shifts the burden of persuasion to the defendant on the issue of his presence at the crime and requires him to establish his innocence, and is inconsistent with the principle that the State must prove defendant's guilt beyond a reasonable doubt, thereby violating the due process clause of the Fourteenth Amendment of the United States Constitution.

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to four years imprisonment on August 20, 1969, in the Superior Court of Cobb County, Georgia, on a charge of robbery, Indictment No. 2496. Application for writ of habeas corpus was made to the United States District Court for the Middle District of Georgia, exhaustion of state remedies being under 28 U.S.C. Sec. 2254 because the State's highest court has consistently held the error complained of did not deny due process of law as guaranteed by the Fourteenth Amendment of the United States Constitution.

In denying the petition for habeas corpus to the United States District Court for the Middle District of Georgia, that court held, No. 2661 (M. D. Ga. July 8, 1971), that there was not gross error "of constitutional proportion" as to deny petitioner due process. The United States Court of Appeals for the Fifth Circuit reversed on February 1, 1972, on the basis of that court's decision in Smith v. Smith, 454 F. 2d 572 (5th Cir. 1971) (No. 71-1311).

ARGUMENT

1. The decision of the Court of Appeals for the Fifth Circuit is in harmony with a contemporary decision of

the Court of Appeals for the Eighth Circuit on the same constitutional law principle. In Johnson v. Bennett, 414 F. 2d 50 (8th Cir. 1969) an Iowa alibi charge was held to be violative of due process.

2. The Court of Appeals of Georgia in Parham v. State, 120 Ga. App. 773 (1969) held Georgia's statutory alibi charge unconstitutional, in light of Johnson v. Bennett, 393 U. S. 253 (1968). (Nevertheless, the Supreme Court of Georgia, Thornton v. State, 226 Ga. 837 (1970) has continued to uphold the charge.)

3. The Court of Appeals for the Northern District of Georgia,

Smith v. Smith, 321 F. Supp. 482 (1970) has held the Georgia alibi charge violative of due process in that it placed on the defendant a burden of proof as to an essential element of the crime, i.e., his presence at the scene, when the accused should have only an "opportunity to rebut" rather than a duty to present evidence.

This traditional position has been the rule in the Fifth Circuit, as proclaimed fifty years ago in Falgout v. U. S., 279 F. 513 (5th Cir. 1922).

4. Even if the Georgia alibi charge did not put on the defendant a burden of proving non-presence, it did eliminate a vital element from the

requirements which must be proved by the state, and it presented to the jury conflicting and misleading instructions and effectively eroded the constitution's protective shield of "presumption of innocence."

Contrary to the district court's view that the defendant must prove his alibi because "it is his undertaking" in asserting the alibi (R. 65), historically it has been the state, not the accused, who "must establish" his case (as charged in the written indictment).

The Georgia charge that a defendant must establish the alibi to the reasonable satisfaction of the jury conflicts with the general charge on reasonable doubt, and the jury is not

instructed which charge to follow. Stump v. Bennett, 414 F. 2d 50 (5th Cir. 1969).

CONCLUSION

The Court of Appeals for the Fifth Circuit has adhered on this issue to the decisions of the Supreme Court of the United States, the Court of Appeals for the Eighth Circuit, the District Court for the Northern District of Georgia, and to its own prior decisions. The issue is well settled, and it is respectfully requested that this court deny writ of certiorari.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that I, counsel of record for Respondent herein, have this day served true and correct copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, by mail, by depositing same in a United States mail box, with first-class postage pre-paid, addressed to the following counsel of record:

Hon. Arthur K. Bolton
Attorney General
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This _____ day of July, 1972.

_____
Edward T. M. Garland